

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STEVEN YAGER,

Plaintiff-Appellee,

v

SEAN K. HOWARD and AMERICAN  
COMMERCIAL FINANCE, INC.,

Defendants-Appellants.

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UNPUBLISHED

August 2, 2007

No. 269120

Wayne Circuit Court

LC No. 04-412726-CK

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting partial summary disposition in favor of plaintiff and a judgment in favor of plaintiff following a bench trial. We affirm.

Defendants first allege that the trial court erred in granting summary disposition against defendant Sean K. Howard in his individual capacity because there were genuine issues of disputed fact. However, review of the written order granting summary disposition and the trial court's oral ruling attached to the written order reveals that the trial court did not specifically rule on the question of individual liability. Rather, the trial court held that there was an improper ouster of plaintiff from the partnership. The trial court further indicated that there was a breach of fiduciary duty, but concluded that a trial was necessary on the issue of damages. Based on the record available, it does not appear that the trial court held defendant Howard individually liable at the partial motion for summary disposition stage.<sup>1</sup> Furthermore, when trial commenced, the parties raised the question of joint and several liability for any damages that arose in the case because the parties could not reach an agreement regarding the prior ruling. The trial court indicated that it had not resolved that issue, stating: "[T]he damages that could flow to each of those entities are different. They are not both liable for everything. It's impossible for – yes, because American, ACF is not a partner with ... Mr. Yager. It is Mr. Howard that was, allegedly, the partner." Thus, based on the record, the trial court was utilizing the bench trial to

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<sup>1</sup> Defendants acknowledge that there is no written order holding defendant Howard individually liable. In the brief on appeal, defendants assert that the trial court implicitly held defendant Howard individually liable.

determine individual and partnership accountability with regard to damages. Therefore, defendants' contention, that the trial court improperly held defendant Howard individually liable when granting partial summary disposition in favor of plaintiff, does not have merit.

We note that, aside from asserting that the summary disposition ruling improperly imposed individual liability, defendants also assert that there were genuine issues of material fact. When reviewing a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court reviews the record de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) tests the factual support of a claim. *Id.* "On review, this Court must consider the record in the light most favorable to the nonmovant to determine whether any genuine issue of material fact exists that precludes entering judgment for the moving party as a matter of law." *Laier v Kitchen*, 266 Mich App 482, 486-487; 702 NW2d 199 (2005).

A partnership is an association of two or more persons to carry on as co-owners of a business for profit. MCL 449.6(1). All partners within a partnership are accountable as a fiduciary when dealing with each other. See MCL 449.21(1). "The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs." *Band v Livonia Assoc*, 176 Mich App 95, 113; 439 NW2d 285 (1989). "The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs." *Id.* at 113-114. "If the parties associate themselves to 'carry on' as co-owners [of] a business for profit, they will be deemed to have formed a partnership relationship regardless of their subjective intent to form such a legal relationship." *Byker v Mannes*, 465 Mich 637, 646; 641 NW2d 210 (2002). There is no requirement that partners be aware of their status as partners in order to have a legal partnership. *Id.*

Based on the record presented, the trial court properly concluded that Steven Yager and defendants formed a partnership and that there was a breach of fiduciary duties to Yager. The evidence showed that Howard excluded Yager from the partnership, which was in contravention of MCL 449.18 (rules determining rights and duties of partners), MCL 449.19 (access to partnership books), MCL 449.20 (duty of partners to render information), MCL 449.22 (right to an account of partnership affairs), and MCL 449.24 (property rights of partners). It was established that Howard precluded Yager from working at the WMAE and Lansing locations, he stopped paying Yager, and he and American Commercial Finance, Inc. (ACF) began to operate the WMAE and Lansing locations without Yager's consent. This action was in contravention of the partnership agreement. Because Howard prevented Yager from participating in the partnership, there were no issues of material fact regarding whether Howard and ACF breached their fiduciary duties to Yager. For the reasons stated, summary disposition on plaintiff's breach of fiduciary duty claim was proper.

Defendants asserted that factual issues were created by the affidavit submitted by defendant Howard. Although the contents of the affidavit portrayed plaintiff as inept and the business in financial ruin, the trial court accepted those facts as true, *Laier, supra*, and nonetheless concluded that summary disposition was appropriate when defendant Howard, in his deposition testimony, admitted that plaintiff was precluded from participating in the business. A

party cannot create a genuine issue of material fact by submitting an affidavit that contradicts sworn deposition testimony. *Cunningham v Dearborn Bd of Ed*, 246 Mich App 621, 635; 633 NW2d 481 (2001). Additionally, although defendant Howard's affidavit opined that plaintiff breached fiduciary duties causing defendants economic harm, as the trial court noted, a counter complaint had not been filed. Accordingly, defendants' contention that factual issues were created precluding summary disposition is incorrect in light of the deposition testimony of defendant Howard.

Defendants next argue that the trial court damages award was improper. We review a trial court's award of damages after a bench trial for clear error. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

When a partnership's dissolution is caused in contravention of the partnership agreement, each partner who has not wrongfully caused dissolution has a right to damages for breach of the agreement against each partner who wrongfully caused the dissolution. MCL 449.38(2)(a)(II); *Brooks v Rose*, 191 Mich App 565, 570-571; 478 NW2d 731 (1991). Case law provides that the remedy for a partner's breach of the fiduciary duty involves placing the wronged partners in the economic position that they would have enjoyed but for the breach. *Gilroy v Conway*, 151 Mich App 628, 637; 391 NW2d 419 (1986).

In April 2002, Yager was prevented from participating in the partnership and was told to buy Howard out of the partnership or the partnership would be dissolved. Because of this breach, the trial court awarded Yager lost wages through the date of the partnership dissolution, which amounted to \$108,000, or \$1,000 a week beginning in May 2002 and ending in January 2005. The court further awarded Yager \$477,500, which was the value of his one half share of the partnership.

"Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, supra*. This Court will not "set aside a nonjury award merely on the basis of a difference of opinion." *Meek v Dep't of Transportation*, 240 Mich App 105, 121; 610 NW2d 250 (2000), overruled in part on other grounds. In light of the evidence presented at trial, we cannot conclude that the damage award was clearly erroneous. *Marshall Lasser, supra*. Yager worked in the freight industry for 23 years when he entered into the partnership with Howard. Although Yager was only seven years away from retirement, he resigned from his position with Airborne Express to enter into the partnership. Yager entered into the partnership because he and Howard agreed that they would share profits and responsibilities equally, and Yager would receive a weekly salary of \$1,000 and health care benefits.

Defendants submit that the trial court's damages award was inappropriate because it was based on speculation and conjecture. However, expert testimony was presented which showed that Yager sustained \$323,680 in lost compensation. Despite Howard's claim, the evidence also showed that the partnership was profitable. The financial statements demonstrated that the partnership generated revenue every year during the partnership. It was also determined that, as of December 31, 2003, the partnership defendant was valued at approximately \$950,954. According to expert testimony, before the partnership was created, ACF was unprofitable. The trial court fashioned an appropriate remedy to allow Yager to be placed in the economic position

that he would have enjoyed but for the breach. *Gilroy, supra*. For the reasons stated, we cannot conclude that the trial court's award was clearly erroneous.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood